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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 1399

MARIO SAVIO, et al.,
Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Judgment of the Superior Court of the State of California, in and for the County of Alameda, Appellate Department

MOTION TO DISMISS OR AFFIRM

The People of the State of California, appellee, pursuant to Rule 16 of the revised rules of this Court hearby moves this Court to dismiss the appeal or affirm the judgment of the Appellate Department of the Superior Court for the County of Alameda, on the ground that the constitutional questions presented are so unsubstantial as to require no further argument.

OPINION BELOW

On January 4, 1967, the Appellate Department of the Superior Court of Alameda County entered an

order affirming appellants' convictions of violating section 602(o) of the California Penal Code (remaining in a public building after closing hours), and section 148 of the California Penal Code (resisting or obstructing arrest).[1] A rehearing was denied on January 17, 1967.

JURISDICTION

Appellants invoke the jurisdiction of this Court under Title 28, United States Code section 1257(2).

QUESTIONS PRESENTED

1. Whether section 602(o) of the California Penal Code is unconstitutional as applied to appellants.

2. Whether section 148 of the California Penal Code is unconstitutional as applied to appellants.

3. Whether appellants could be convicted of violating section 602(o) of the California Penal Code when they were simultaneously acquitted of violating California Penal Code section 409 (remaining at the scene of an unlawful assembly).

4. Whether the procedure adopted in the trial of appellants was such as to deny them due process of law.

STATEMENT OF THE CASE

A. Introduction

On December 3, 1964, 773 persons were arrested at Sproul Hall, the Administration Building of the

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[1]These sections as well as other relevant statutes are set out in Appendix "A" of this motion.

University of California at Berkeley. Each of these persons was charged by complaint filed on December 7, 1964, in the Municipal Court for the Berkeley-Albany Judicial District, with the misdemeanor offenses of violating section 602(o) and 409 of the Penal Code of the State of California. A majority of the defendants were also charged with the misdemeanor offense of violation of section 148 of the Penal Code. Nine of the persons arrested were juveniles and thereafter proceedings concerning them were based upon petitions filed in the Juvenile Court of Alameda County. Of those adults arrested and charged 756 were convicted and sentenced. Of those convicted, 101 entered pleas of *nolo contendere;* the remainder were found guilty following trial by the court without a jury. Of those convicted by trial, 155 moved to consolidate their cases and were tried in a single consolidated trial. The other 500 defendants were tried by way of submitting their cases to the court on testimonial stipulations. Each defendant was convicted of a violation of section 602(o) and a majority of the defendants were also convicted of a violation of section 148. No defendant was convicted of a violation of section 409, such charges were either dismissed by the prosecution or resulted in not guilty verdicts by the trial court.

The record on appeal consisted of a Reporter's Transcript of the testimony, evidence and arguments at the consolidated trial, cited by date, page, and line, *e.g.,* 4-1 RT 10:1-10; a Clerk's Transcript pertaining to the First Consolidated Trial, which was the designation in the Municipal Court, cited, *e.g.,* CT (FCT)

10; a Clerk's Transcript consisting of an individual file for each complaint filed in the Municipal Court, said complaints being numbered C-7468 through C-7547, cited *e.g.*, CT (7468) 10; and a Clerk's Transcript containing documents pertinent to all cases before the Municipal Court, cited *e.g.*, CT (A) 10.

B. Statement of Facts

Robert Gordon Sproul Hall is the Administration Building for the Berkeley campus of the University of California. The building and the land upon which it is situated are owned by the Regents of the University of California. The Building itself has a basement and four stories. It houses offices vitally concerned with the business and academic life of the University.

Specifically:

Office of the Vice-Chancellor in charge of Business and Finance (the University business manager).

Purchasing Department (for all University supplies).

Payroll Department;

Cashier's office;

Accounting Department;

Dean of Students;

Dean of Graduate Students;

Registrar;

Admissions Office;

Public Information Office;

University of California Police Department.

The building is open to all members of the public having business to conduct therein. 4-1 RT 61-66, 89-90 and 4-22 RT 45-50.

The University of California Police Department has the responsibility for the security of all buildings on the campus, including Sproul Hall. The University has no guards or watchmen other than the campus police. 4-1 RT 67. Sproul Hall regularly closes at 7:00 p.m. On Wednesday, December 2, 1964, the building was closed at that time at the direction of Lt. Merrill Chandler of the campus police. 4-1 RT 71-72; 4-6 RT 36-37, 43.

At noon on December 2, 1964 a rally was conducted at and about the steps leading to the main entrance of Sproul Hall. After some 20 minutes of speeches and singing, a large number of persons entered Sproul Hall, the vanguard proceeding first to the Dean of Students office on the second floor and thereafter the crowd spreading out and settling down on the several floors of the building. 4-1 RT 23-26; 4-5 RT 4-6; People's Exhibit 484, 4-26 RT 65. Before entering the building, the crowd had been addressed by speakers who described conduct of officials in the University administration, expressed disagreement with the conduct as they related it, and urged those assembled to enter Sproul Hall and remain there as a protest.

Excerpt from statements by appellant Michael Rossman, 4-1 RT 107-108:

> "... If we walk into this building and disrupt the functioning nobody knows what's going to happen. There may be disciplinary action coming

> out of it, up to and including suspensions of expulsions. The police may come and take us away one by one. But by God, if that machine is going to go on and not treat us like human beings, not listen to the five thousand who are out in front of the Regents, not discuss any of the real issues, then it's going to go on with some live human bodies sitting right inside its bowels."

Excerpt from statements by appellant Mario Savio, 4-1 RT 114:

> ". . . We're going to do the following, and the greater the number of people the safer they'll be and the more effective it will be, we're going, once again, to march up to the second floor of Sproul Hall. And we're going to conduct our lives for awhile on the second floor of Sproul Hall."

A large number of persons remained in the building throughout the afternoon and were still present when the building closed at 7:00 p.m. At 6:45 p.m., Lt. Chandler went to the 4th floor of Sproul Hall, and using a portable loudspeaker, made the following statement, "You are hereby notified that this building closes at 7:00 p.m. You are all requested to leave at once." 4-1 RT 37-39. The Lieutenant repeated this same statement at each end of the three lower floors of Sproul Hall, the entire process terminating at about 7:20 p.m. 4-1 RT 39-45.

Persons entering Sproul Hall on this occasion brought with them, in some instances, sleeping bags, knapsacks, blankets, mattresses, food, clothing, musical instruments, motion picture and sound equip-

ment, 4-6 RT 30-35; 4-7 RT 11-102, and 4-8 RT 14. Shortly after entering, someone climbed to a balcony outside the center windows of the second floor and removed the bolts which fastened them shut from the outside. The windows were then opened and sound equipment moved to the balcony which overlooks the plaza in front of Sproul Hall. Large signs displaying the letters, "F", "S", and "M", were put in place, one in each of the three windows facing the plaza, 4-6 RT 32-35, 49. In the evening after 7:00 p.m., movies were shown in the second floor foyer, group discussions were scheduled and held, and there was dancing on the first floor, 4-7 RT 102-103; 4-8 RT 32. Campus police were required to remove some persons from the roof and out of closed offices, 4-6 RT 50-53.

At about 12:30 a.m. on December 3, 1964 appellant Mario Savio came to the lobby area of the first floor and announced with a bullhorn, to persons at and about that area, that the Governor was going to remove everybody from Sproul Hall, that everyone should vacate the first floor and go to the second, third and fourth floors to make it as difficult as possible for the police to move them, and that they should give their names and go limp, 4-7 RT 102-104. Thereafter, people did vacate the first floor and move to the upper floor where they remained until arrests took place, 4-7 RT 102-104.

At approximately 3:15 a.m. the Chief Campus Officer of the University of California at Berkeley, Chancellor Edward Strong, went to the second floor of Sproul Hall, using a bullhorn, and made the following

statement (interrupted once as indicated), to the large group of persons then present in the hallway:

"I am Dr. Edward Strong, Chancellor of the Berkeley Campus. I have an announcement. This assemblage has developed to such a point that the purpose and the work of the University have been materially impaired.

"It is clear that there have been acts of disobedience and illegality which cannot be tolerated in a responsible educational center and would not be tolerated anywhere in our society.

UNIDENTIFIED VOICE: Except Berkeley...

"The University has shown great restraint and patience in exercising its legitimate authority in order to allow every opportunity for expressing differing points of view.

"The University always stands ready to engage in the established and accepted procedures for resolving differences of opinion.

"I request, that each of you, cease your participation in this unlawful assembly.

"I urge you, both individually and collectively, to leave this area.

"I request that you immediately disperse. Failure to disperse will result in disciplinary action by the University.

"Please go." 4-2 RT 120-126.

Immediately following this statement, Lt. Chandler made this announcement on the second floor, using the bullhorn:

"This is Lt. M. F. Chandler of the University of California Police Department. I direct your

attention to the fact that this assemblage is now in violation of the laws of the State of California. And that it is my duty and responsibility, as prescribed by law, to disperse it.

"However, before so doing I feel that all persons within hearing should know that the assemblage has become illegal and you are so notified.

"To again identify myself, I am Lieutenant M. F. Chandler of the University of California Police Department.

"A condition of unlawful assemblage now exists. Under authority of Section 726 of the Penal Code, of the State of California, and in the name of the People of the State of California, I command you to disperse. I further notify you that all persons who do not immediately disperse are in violation of the California state law and are subject to arrest.

". . . leave the building, or you will be arrested." 4-6 RT 57-61.

The Chancellor and Lt. Chandler then went to the third and fourth floors of the building and repeated the announcements to persons there assembled, 4-2 RT 126-129; 4-6 RT 62-64. Lt. Chandler alone repeated his announcement thereafter on the first floor, 4-6 RT 64-65.

Arrest teams of the Berkeley Police Department, equipped with tape recorders and cameras began making arrests on the fourth floor of the building. The first arrest took place at 3:40 a.m. 4-7 RT 13-14; 4-8 RT 41.

Arrests were made in the following manner: an officer approached an individual seated on the floor of a hallway in Sproul Hall, identified himself, ascertained if the individual would leave the building and upon refusal to do so, placed the individual under arrest for violations of Penal Code sections 602(o) and 409; if the individual would not move of his own volition from the scene of arrest, but simply remained where he was, officers carried out the arrest previously made by physically transporting the individual from the site of arrest, and an additional charge of violation of section 148 was made. Some persons voluntarily walked from the scene of arrest, some did not. Tape recordings were made of the conversation between the officer and the individual placed under arrest, and photographs were taken of the person arrested, 4-7 RT 13-14, 17-21; 4-8 RT 40-44.

Arrests continued until the fourth floor was cleared and the arrest teams then moved to the third floor and continued making arrests; the first arrest on this floor taking place at 6:00 a.m. 4-8 RT 43-44. At about 8:00 a.m., Captain Beall of the Berkeley Police Department observed a great deal of activity in and about the foyer area in the middle of the second floor, including persons on the balcony area using loud speaker equipment to address people gathered in the plaza in front of Sproul Hall, 4-7 RT 24-26. Captain Beall obtained assistance from other officers, went to this area and arrested appellant Jack Weinberg, one of the persons using sound equipment on the balcony. Appellant Weinberg went

limp and officers moving him from the area had to make their way through persons who blocked their progress by throwing their bodies in the path of the officers, amid great yelling, noise, and various epithets. 4-7 RT 26-30.

At about 8:30 a.m. the arrest process was moved to the second floor although a number of persons still remained on the third floor. Thereafter, arrests were carried out on the second floor until it was cleared at about 1:30 p.m. 4-7 RT 33-36. The arrest teams moved back to the third floor and completed the last arrest shortly after 3:00 p.m. on December 3rd, 4-8 RT 75-77.

C. Trial Proceedings

On December 7, 1964, 80 complaints were filed in the Municipal Court for the Berkeley-Albany Judicial District and were assigned court numbers C-7468 through C-7547. Defendants were charged, in most cases, in groups of 10, and were joined only with other defendants similarly charged, *i.e.*, those with three counts charged, 602(o), 409, and 148, and those with two counts charged, 602(o) and 409. Individual defendants appeared in court thereafter and waived time for trial. See Minutes in CT 7468 through CT 7547.

On January 26, 1965 appellants filed with the court a motion for pretrial hearings and for consolidation for purposes of pretrial hearings, CT (A) 125. On February 2, 1965 the demurrer was overruled and arraignment of appellants began.

The motion for pretrial hearings was not opposed by the prosecution and on February 2, 1965 the court ordered such hearings, the first scheduled for February 10, 1965. On that date, and subsequently, the court conducted pretrial hearings attended by counsel for the prosecution and a large number of attorneys for defendants. Further conferences were conducted at the court's direction between prosecution counsel and five attorneys designated by appellants to represent them for such purposes.

On March 10, 1965 a motion was made by appellants to consolidate 155 defendants in a joint non-jury trial. This motion was granted by the court, CT (A) 3. Trial was scheduled for April 1, 1965. Each of the defendants joined for trial had previously personally appeared before the court and waived a jury trial and had filed with the court a written waiver of jury trial signed by himself and his attorney. See, *e.g.*, waiver of Manuel Abascal, CT (FCT) 359. The joint trial was set for April 1, 1965 and denominated in the Clerk's records as the "First Consolidated Trial".

First Consolidated Trial

The trial was held in the Veterans Memorial Building, 1931 Center Street, Berkeley, in an auditorium converted to a courtroom. After provision for the court, the clerk, witnesses, reporter (a weekly transcript was made at the direction of the court) and counsel tables, there was a seating capacity for some 300 persons. All proceedings were conducted

with the aid of microphones, counsel addressed the court from a central lectern, and all exhibits were projected on a motion picture screen with the aid of a Vue-graph, 4-1 RT 30-33.

As a result of pretrial conferences there had already been thorough pretrial discovery of prosecution evidence by counsel for the defendants; there was a stipulation as to identity of the individual defendants so that they could be excused from the trial for work or study; there was provided to the defense a list of all persons known to be present at and about Sproul Hall at the time arrests took place; and there was provided a list of all witnesses to be called including when they would be called and what specific defendants would be referred to in their testimony.

Trial commenced April 1 and the presentation of testimony, evidence and argument concluded on June 11th. The cases were submitted and on June 28, 1965 the court found each of the defendants now on appeal guilty of a violation of section 602(o) and of a violation of section 148.

The prosecution evidence consisted basically of that described in the Statement of Facts hereinabove, as well as specific evidence concerning the arrest of each defendant, including when, where, who and how this took place. Photographs of each defendant at the place of arrest and transcriptions of tape recordings, where available, were introduced in evidence.

Nineteen defendants testified at the trial. (Three of these individuals, Herbert Henryson, Amy Jo Fillin,

and Joe La Pointe have not appealed their convictions.) The major thrust of such testimony concerned the individual's state of mind as it related to whether or not they had "lawful business to pursue" in the building, and their conduct in not walking out with the officer after arrest. There were significant differences from defendant to defendant but in essence the state of mind so related was a belief that the University's rules were wrong, that the conduct of the University administration was wrong and that their individual conduct on December 2 and 3 was in protest of this situation. A testimonial stipulation was entered into as to the great majority of the remaining defendants who did not testify, which substantially restated the state of mind assertions already made at trial.

Individual Trials

Before the conclusion of the First Consolidated Trial, based on continuing conferences between the prosecution and defense attorneys, a method of submitting individual cases to the court for trial upon a stipulated set of facts was agreed upon. The stipulation included the facts concerning each individual's arrest, a testimonial assertion as to each defendant's state of mind (in the same language as had been agreed upon concerning defendants in the First Consolidated Trial who did not testify), and a stipulation that the trial court could consider the testimony of those witnesses who had already testified at the First Consolidated Trial (insofar as such testimony had

been admitted generally and not insofar as such testimony had been admitted only as against a particular defendant). In those cases where the defendant was not charged with a violation of section 148, there was no stipulation concerning moving the defendant from the scene of arrest inasmuch as such defendants had in fact walked out of the building following arrest. A total of 500 cases were submitted for trial in this fashion to the trial court. All defendants were found guilty of a violation of section 602(o), not guilty of a violation of section 409, and guilty of a violation of section 148 in those cases where that offense was charged and proved.

ARGUMENT

I

APPELLANTS WERE PROPERLY CONVICTED OF VIOLATING SECTION 602(o) OF THE CALIFORNIA PENAL CODE

Appellants commence their legal argument with an attack upon section 602(o) of the California Penal Code as applied to their conduct. They appear to argue that the statute was stretched beyond the plain meaning of its terms to support the prosecution against them and further, that their conduct was political activity protected by the First Amendment. These arguments are meritless.

Section 602(o) is simply a trespass law intended to preserve the security of public buildings during hours when such buildings are regularly closed, against individuals who remain without any lawful purpose.

This section clearly sets forth the type of conduct which is forbidden and specifically describes the nature of the required warning to leave. In *Edwards v. South Carolina,* 372 U.S. 229 at 236-237 (1963), this Court quoted with approval an analogous statute regulating the use of public buildings.

Appellants argue that because Sproul Hall was the Administration Building for the Berkeley Campus of the University, they had a right to occupy it for purposes which they at the time announced were explicitly disruptive (4-1 RT 107-108), but which they now blandly characterize as "political." They even argue that although their conduct was intended to disrupt the administration of the University, it should be treated as the exercise of academic freedom. Boiled down to its essentials, appellants' argument is no more than the discredited proposition that if individuals believe that their cause is just, they can trample on the rights of the community without any legal accountability. Fortunately, however, this argument has been put to rest by the decisions of this Court in *Cox v. Louisiana,* 379 U.S. 536 (1965) and *Adderley v. Florida,* 385 U.S. 39 (1966).

In *Cox v. Louisiana, supra,* this Court stated as follows:

> "The rights of free speech and assembly while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which

liberty itself would be lost in the excesses of anarchy." *Cox v. Louisiana, supra,* 379 U.S. at 554.

. . . . . .

"We emphatically reject the motion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." *Id.* at 555.

. . . . . .

"Nothing we have said here or in No. 24, *ante,* is to be interpreted as sanctioning riotous conduct in any form of demonstrations, however peaceful their conduct or commendable their motives, which conflict with properly drawn statutes and ordinances designed to promote law and order, protect the community against disorder, regulate traffic, safeguard legitimate interests in private and public property, or protect the administration of justice and other essential governmental functions.

"Liberty can only be exercised in a system of law which safeguards order. We reaffirm the repeated holdings of this Court that our constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful social protest, so important to the preservation of the freedoms treasured in a democratic society. We also reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty under law, and that the right of peaceful protest does not mean that everyone with opinions or beliefs to

express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations." *Id.* at 574.

This doctrine was restated by the Court in *Adderley v. Florida, supra,* as follows:

> "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only "reasonable" but also particularly appropriate . . . .' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, *Cox v. Louisiana, supra,* 554-555 and 563-564." 385 U.S. at 47-48.

Appellants' argument that the trial court did not make findings of fact is irrelevant. Findings of fact are not required in criminal cases; the verdict of guilty returned by the judge demonstrates that appellants were found to have committed all the elements of section 602(o). This narrowly drawn statute, specific as to its terms and valid on its face, was

obviously correctly applied to appellants under the facts of this case.

II

APPELLANTS WERE PROPERLY CONVICTED OF VIOLATING SECTION 148 OF THE PENAL CODE

Section 148 of the California Penal Code makes it a misdemeanor to resist, delay or obstruct a public officer in the discharge of his duties. Appellants claim that it is a novel and unconstitutional interpretation of this section to apply it to what they describe as passively refusing to cooperate with an arrest.

Actually, the record shows that appellants had been occupying all portions of Sproul Hall until the appellant Savio came into the lobby area of the first floor and announced with a bullhorn that everybody was going to be removed from Sproul Hall and they should therefore vacate the first floor and go to the upper floors and make it as difficult as possible for the police to move them, and that they should give their names and go limp (4-7 RT 102-104). Even if this sort of conduct can charitably be characterized as "passive resistance" it still comes within the terms of section 148.

Appellants' claims of novelty notwithstanding, it has been the law for nearly ninety years that the offense of obstructing or delaying a public officer is not limited to those acts which would amount to forcible resistance; the offense comprehends as well, conduct which amounts to "any passive, indirect or circuitous

impediments" to the discharge of a public officer's duty. *United States v. MacDonald,* 26 Fed.Cas. 1074, 1077 (E.D. Wis. 1879); accord, *Miller v. United States,* 230 F.2d 486, 488 (5th Cir. 1956); *State v. Goering,* 392 P.2d 930, 932 (Kan. 1964). Indeed, in some instances the mere use of words could constitute such interferences. See *Ex parte Geissler,* 4 Fed. 188, 190 (N.D. Ill. 1880).

Thus the application of section 148 to appellants' conduct is not an unconstitutional enlargement of a statute, merely the application of a settled principle of law to a contemporary tactic of obstruction. Appellants' conduct in this matter was clearly intentional and the statute was properly applied to it.

III

APPELLANTS' CONVICTION VIOLATING SECTION 602(o) OF THE CALIFORNIA PENAL CODE WAS NOT VITIATED BY THEIR ACQUITTAL ON CHARGES OF VIOLATING SECTION 409

Section 409 of the California Penal Code makes it a misdemeanor to remain at the scene of a riot, rout or unlawful assembly after having been warned to disperse. At the same time they were convicted of trespass in violation of section 602(o), and resisting arrest in violation of section 148, appellants were acquitted of the charges of violating this section.

Appellants now argue that their acquittal under section 409 may have been to the lawful nature of the assembly because of its protected character under

the First and Fourteenth Amendments and that under the circumstances the trespass statute would have been unconstitutionally applied. *Adderley v. Florida, supra,* is a sufficient answer to this contention.

Actually, under California law as applied to the facts of this case, the acquittal on charges of unlawful assembly makes a good deal of sense. Unlawful assembly is defined by section 407 of the California Penal Code.[1] That section provides that whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, such assembly is an unlawful assembly. Thus, the trial court could reasonably conclude in this case that because the appellants had, after assembling together in Sproul Hall, actually accomplished an unlawful objective, *i.e.,* a violation of section 602(o), it would be inappropriate to convict them of the offense of remaining present at an unlawful assembly.[2]

A further reason supports the trial court's decision to acquit on the charge of violating section 409. This state, in section 654 of the California Penal Code,[3] has enunciated a policy against double punishment so that where an act is made punishable by more than one provision of the Penal Code it may be punished under any such provision but in no event more than one. This doctrine applies where in a single course

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[2]Subsequent to appellants' trial, the California Court of Appeal held that the offense of unlawful assembly is complete when there is an assembly for an unlawful purpose, regardless of whether the unlawful purpose is actually achieved. *In re Bacon,* 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966).

[3]See Appendix "A".

of conduct having one objective a defendant violates more than one section of the Penal Code. See *Neal v. State,* 55 Cal.2d 11, 9 Cal.Rptr. 607, 357 P.2d 839 (1961). While the provisions of Penal Code section 654 prohibit multiple punishment, not multiple conviction (see *People v. McFarland,* 58 Cal.2d 748, 26 Cal.Rptr. 473, 376 P.2d 449 [1962]), the trial court could properly conclude that little would be served by convicting appellants of an offense for which they could not be punished. Thus it acquitted them of an offense which it believed was merely preparatory and included within the offense of which they were convicted, namely, violation of section 602(o).

In any event it seems crystal clear that the decision of the trial court to acquit appellants of violating section 409 in no way vitiates their conviction on the trespass charge.

IV

APPELLANTS HAD A FAIR TRIAL

Appellants' final argument in favor of the jurisdiction of this Court to entertain their appeal is no more than a melange of unspecified and unsupported allegations respecting the fairness of their trial. None of their arguments deserve lengthy discussion because they are all refuted by the record. Thus appellants' argument that they were denied a meaningful jury trial is countered by their own concession that each of the appellants personally waived jury trial. Appellants' assertion that their own demand for a rep-

resentative jury trial of a number of defendants convenient to themselves was the only manner in which the proceeding could be fairly conducted is supported by nothing but their own say-so. Their argument that the proffered choice of trying approximately ten of the appellants at a time before juries would have amounted to a staggering burden on them ignores the fact that such a procedure would have been burdensome to the prosecution as well. But the prosecution was prepared to give the defendants jury trials if they demanded them. However the defendants waived jury trial and this should be the end of the matter.

Appellants also contend that they were denied meaningful pretrial discovery. Discovery is a creature of statute, and the Constitution does not require that it be granted in criminal cases. However the record in this case shows that the defense was provided a list of all persons known to be present at or about Sproul Hall at the time of the arrest and a list of all witnesses to be called including when they would be called and what specific defendants would be referred to in their testimony. Appellants' claim to the contrary is simply untrue.

Appellants' final argument is that in passing sentence, the trial court discriminated against those defendants who did not plead *nolo contendere* and thus violated their rights to due process of law. This argument is unsupported by anything more substantial than appellants' speculation.

The limits imposed by the Penal Code permit the imposition of a $500 fine and six months in jail for

violation of section 602(o), and an additional fine of $1,000 and one year in jail for a violation of section 148. The sentences actually imposed in this case range from simple probation granted to 23 defendants to mandatory jail terms rendered 11 defendants. Fines imposed as punishment ranged from $25 assessed against 17 defendants to $400 assessed against one defendant. An obvious result was that many defendants received the same sentence.

Though appellants speculate that the court based their sentences on whether or not they pleaded *nolo contendere,* the record contains an outline of the matters considered by the court in imposing sentence. Before passing sentence the trial judge stated:

> "It now becomes the duty of this Court to impose sentence on each defendant convicted in the cases now before the Court. In arriving at the sentence to be imposed, the Court has considered the evidence in the case; the information submitted by the attorneys for both sides, the information provided by individual defendants and others writing on their behalf. The Court has also considered the report of the probation officer in those cases submitted for presentence investigation." (7-19 RT 7.)

And further:

> "The evidence in these cases and the information provided to the Court indicates certain facts in mitigation, or aggravation, of the penalty which should be imposed on individual defendants. The Court is mindful of the youth of many of the defendants, their relative maturity and

experience, as well as the seriousness of the conduct involved. It is also mindful that the future effect of sentence depends upon each individual's understanding and reception of the sanction imposed.

"Accordingly, in determining sentence, the Court has provided an opportunity for each defendant to subsequently clear his record as provided by the law of this state." (7-19 RT 8.)

CONCLUSION

None of the matters advanced by appellants rise to the dignity of a substantial federal question and therefore we urge this Court to dismiss the appeal or to summarily affirm. If the appellants' jurisdictional statement be treated as an application for a writ of certiorari, we urge that it be denied.

Dated, San Francisco, California,
June 5, 1967.

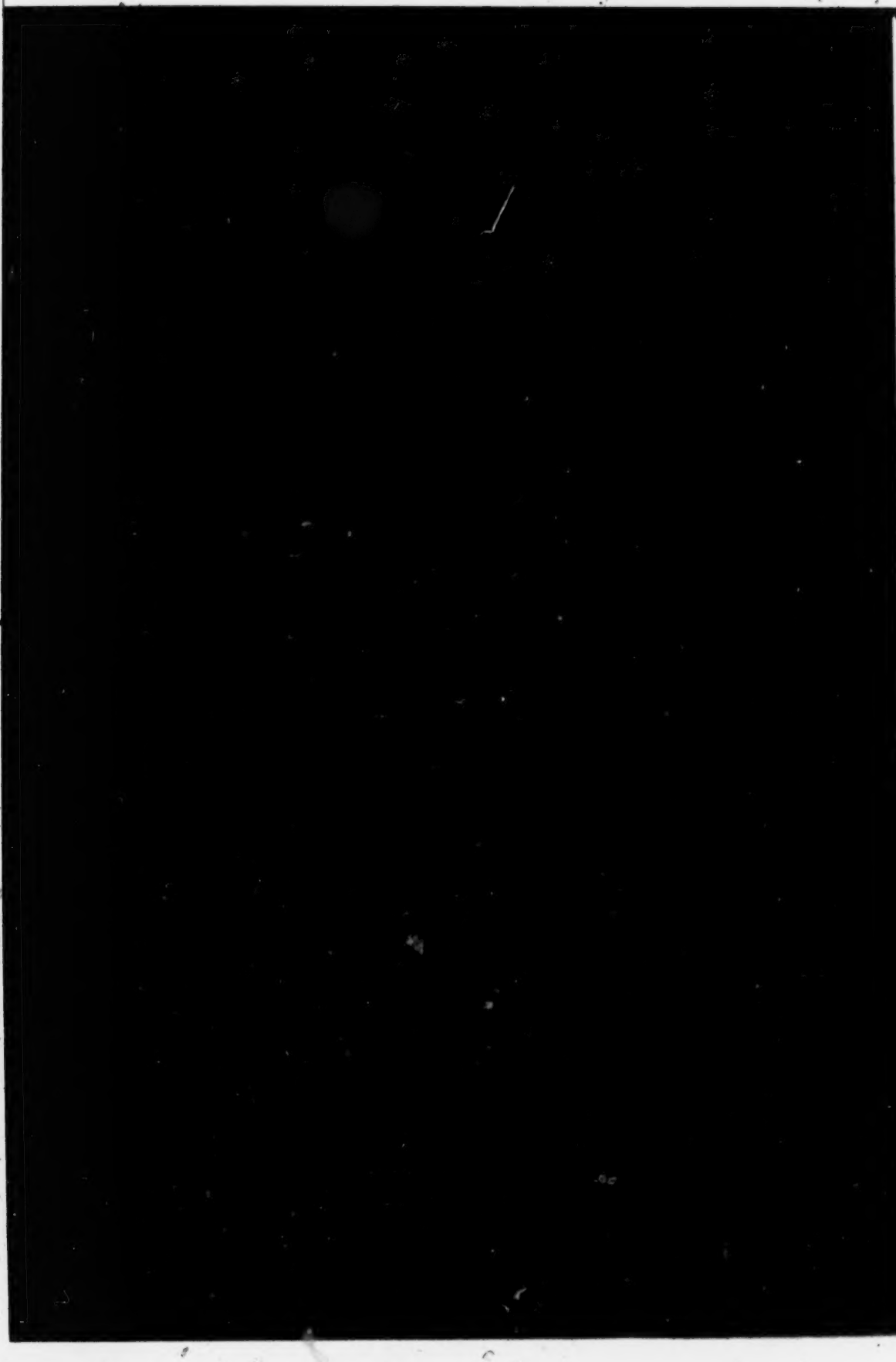
Respectfully submitted,

THOMAS C. LYNCH,
Attorney General of the State of California,

ROBERT R. GRANUCCI,
Deputy Attorney General of the State of California,

Attorneys for Appellee.

(Appendix "A" Follows)



Appendix "A"

California Penal Code § 148.

Every person who wilfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

California Penal Code § 407.

Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.

California Penal Code § 409.

Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

California Penal Code § 602(o).

Every person who wilfully commits any trespass by

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Refusing or failing to leave a public building of a public agency during those hours of the day or night when the building is regularly closed to the public

upon being requested to do so by a regularly employed guard, watchman, or custodian of the public agency owning or maintaining the building or property, if the surrounding circumstances are such as to indicate to a reasonable man that such person has no apparent lawful business to pursue; is guilty of a misdemeanor.

California Penal Code § 654.

An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. In the cases specified in sections six hundred and forty-eight, six hundred and sixty-seven, and six hundred and sixty-eight, the punishments therein prescribed must be substituted for those prescribed for a first offense, if the previous conviction is charged in the indictment and found by the jury.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

SAVIO ET AL. *v.* CALIFORNIA.

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA.

No. 1399. Decided June 12, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.